

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ADEL AHMED</b>	:	DETERMINATION
	:	DTA NO. 819079
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period October 31, 2000.	:	

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Petitioner, Adel Ahmed, 64 Ash Street, Apt. # 3, Yonkers, New York 10701, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period October 31, 2000.

A small claims hearing was held before Joseph W. Pinto, Jr., Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 20, 2004 at 10:45 A.M. which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (John Walther).

***ISSUE***

Whether petitioner was a person in possession or control of 96.5 cartons of unstamped or unlawfully stamped cigarettes and, therefore, liable for a penalty pursuant to Tax Law § 481 (former [1][b]).

***FINDINGS OF FACT***

1. On October 31, 2000, investigators of the Division of Taxation (“Division”) conducted an inspection of Sarah’s Deli Grocery located at 1646 Madison Avenue in New York City

(Manhattan). During their inspection of the premises, the investigators discovered 96.5 cartons of Virginia stamped cigarettes behind the counter and in the basement. Despite his protestations and repeated assertions that he did not own the business and had not purchased the cigarettes found on the premises, petitioner was read his “Miranda” warnings and charged with possession for sale of untaxed cigarettes in New York State (Tax Law § 1814[d]), attempt to evade or defeat New York State cigarette tax (Tax Law § 1814[a][1]) and maintaining no cigarette business records (Tax Law § 1814[h]). In addition, petitioner was issued a summons to appear in the Criminal Court of the City of New York, New York County, on January 22, 2001.

2. Four months prior to the inspection, petitioner occupied and managed a store at the premises which suffered extensive damage in a fire, as seen in a photograph in evidence and described by petitioner. At that time, petitioner, having no insurance, decided to cease business operations and sought new employment with Taqwa Security in the Bronx. After a brief stint as a security officer, petitioner gained employment as a bus driver with Suburban Paratransit Service in White Plains, New York, where he has been employed for the last three years.

3. Pursuant to petitioner’s sworn testimony and a statement from the landlord of the premises at 1646 Madison Avenue, the tenant occupying and managing the store on the inspection date was one Alexander Lizardo. Further, petitioner’s presence at the store on the day the investigators arrived was for the exclusive purpose of collecting moneys that were owed to him by Mr. Lizardo, who, together with an employee, was also in attendance that day. Petitioner had brought his spouse, three children and two dogs as well.

4. During the inspection, the investigators asked the employee at the register if petitioner was the owner and his response was that petitioner “was” the owner. While the investigators turned their attention to Mr. Ahmed, Mr. Lizardo left the premises.

5. The investigators interrogated petitioner regarding where he purchased cigarettes and discussed the possibility of setting up a “buy/bust” involving his supplier. The investigators told petitioner his failure to cooperate would result in the immediate suspension of his certificate of registration. Petitioner agreed to help the investigators in any way he could. Despite these plans, petitioner was never contacted to help apprehend the supplier.

6. On November 27, 2000, the tax enforcement unit sent a letter to petitioner which informed him his certificate of registration had been suspended for six months.

7. Pursuant to the summons issued to him, petitioner appeared in the Criminal Court of the City of New York, New York County, on January 22, 2001 and on other return dates subsequent thereto, but the Division of Taxation and its investigators did not appear. On May 8, 2001, Judge Wallace dismissed the charges against petitioner for the Division’s failure to prosecute.

8. On May 14, 2001, the Division issued a Notice of Determination to petitioner which set forth penalty due in the amount of \$8,600.00.<sup>1</sup> The explanation given was that petitioner was found in possession of unlawfully stamped cigarettes and was liable for the penalty under Article 20 of the Tax Law.

9. On May 24, 2004, the Division issued to petitioner a consolidated statement of tax liabilities which set forth the original \$8,600.00 due on the Notice of Determination and a payment of \$717.33, leaving a balance due of \$7,882.67. Earlier, on March 5, 2004, the Division had sent petitioner a statement of tax refund which indicated that petitioner had a

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<sup>1</sup>Apparently, the Division did not include the half carton of cigarettes in calculating the penalty.

refund of income tax for the tax year 2003 and that it had been applied to other tax liabilities. However, those assessment numbers did not include the Notice of Determination in issue.<sup>2</sup>

10. The investigators, who charged petitioner and filed an unsworn investigative report which formed the basis of the Division's case against petitioner, failed to appear and testify at the hearing in this forum just as they failed to appear in the dismissed case in the Criminal Court of the City of New York, New York County.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 481(former[1][b]) provided, in pertinent part, as follows:

[T]he commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person . . . . The commissioner of taxation and finance, in his discretion may remit all or part of such penalty.

B. Based on the evidence in the record, petitioner was not liable for the penalty asserted by the Division because he was not in possession or control of the unlawfully stamped (Virginia) cigarettes found at Sarah's Deli Grocery on October 31, 2000.

Petitioner's uncontradicted credible testimony established that, after the fire at the premises about four months prior to the investigator's visit, he left the business and took a job as a security officer with Taqwa Security in the Bronx and then as a bus driver for Suburban Paratransit in White Plains, New York, a job he holds currently. Petitioner was at the premises on October 31, 2000 with his spouse, three children and two dogs to collect money owed him by the current owner, Alexander Lizardo. Further, the clerk informed the investigators that petitioner "was" the owner, an unfortunate choice of words, which did not underscore the fact that petitioner was not the current owner of the business.

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<sup>2</sup>The notices to which the refund was applied were: L018396541; L019378844; and L019939325.

Petitioner agreed to assist the investigators in any way he could since he believed he was not liable for the cigarettes found at the premises on October 31, 2000. Although the investigators' report assumed petitioner's guilt based on statements made by petitioner and his spouse, it appears they did not understand the actual facts as credibly testified to by petitioner at hearing. Since the Division offered no documentation or testimony to support its assertions, its case was severely weakened.

C. Further underscoring the Division's weak position was its failure to follow up with petitioner on the sources of cigarettes he provided to it and its failure to prosecute the criminal case it initiated against him in the Criminal Court of the City of New York, the latter of which forced petitioner to attend court several times, to his detriment, before the action was dismissed. For these shortcomings, and the reasons cited above, it is concluded that petitioner was not a person in possession or control of 96.5 cartons of unlawfully stamped cartons of cigarettes.

D. The consolidated statement of tax liabilities noted the penalty asserted of \$8,600.00 and a payment or credit applied against it of \$717.33. Given the cancellation of the Notice of Determination, petitioner is entitled to a refund or credit of \$717.33 plus interest if applicable.

E. The petition of Adel Ahmed is granted and the Notice of Determination, dated May 14, 2001, is canceled, with the appropriate adjustment for payment or credit referred to in Conclusion of Law "D".

DATED: Troy, New York  
September 16, 2004

/s/ Joseph W. Pinto, Jr.  
PRESIDING OFFICER